Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 17, 1992

Ms. Diana L. Granger
Deputy City Attorney
City of Austin
708 Colorado Street, Box 1088
Austin, Texas 78767-8828

OR92-30

Dear Ms. Granger:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 11242.

The City of Austin received an open records request for "copies of all the proposals submitted to Brackenridge Hospital" in response to the city's Request for Proposals for temporary nursing services. You state that the city notified each of the eleven contractors who responded to the RFP about the open records request and asked them to submit arguments for the nondisclosure of their proposals including marked copies of the proposals indicating the confidential, proprietary information. Of the eleven contractors, five have indicated that portions of their proposals contain information coming under the protection of section 3(a)(10).

Section 3(a)(10) of the Open Records Act excepts from required public disclosure:

> trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. This office recently recognized that, because there exists in Texas no judicial decision that would make "commercial or financial infor-

mation" confidential under common law, this type of information may not be withheld pursuant to section 3(a)(10) unless the information is specifically made confidential by statute. *See* Open Records Decision No. 592 (1991) (copy enclosed). You have not cited, and this office is unaware of, any statute that makes the information contained in the proposals confidential. Consequently, the proposals may be withheld only to the extent that they contain trade secrets.

A "trade secret" is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958) (quoting Restatement of Torts, § 757, comment b (1939); *see also* Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret:

> 1) the extent to which the information is known outside of [the company's] business;
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> 2) the extent to which it is known by employees and others involved in [the company's] business;
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> 3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> 4) the value of the information to [the company] and to [its] competitors;
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> 5) the amount of effort or money expended by [the company] in developing this information; and
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> 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 comment b (1939); *see also* Open Records Decision No. 232, *supra*. In Open Records Decision No. 552 (1990) this office stated that, even when a governmental body takes no position on a third party's 3(a)(10) claim, "the attorney general must accept a claim for exception as valid if the *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." In the present case, the City of Austin supports the 3(a)(10) claims of the five responding proposers.

In our opinion, Nurses Plus, Inc., has demonstrated a *prima facie* case that its financial information, scheduling card, employee evaluation procedure, and quality assurance procedure and forms constitute trade secrets. *See* Open Records Decision No. 552; *See also Gonzales v. Zamora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi 1990, no writ). Similarly, we believe that Medical Personnel Pool has presented a *prima facie* case that the various tests it has developed are trade secrets. Consequently this information may be withheld pursuant to section 3(a)(10). We also find that Liberty Nursing has made such a showing in regard to the tests comprising "Attachment B" of its proposal, as well as the various sections discussed in "Supporting Arguments for Proprietary Sections in Brackenridge Hospital RFP No. BCO-243," submitted January 18, 1991. The portions of the Hooper-Holmes, Inc., and Kimberly Quality Care proposals designated as confidential may also be withheld.[1] The balance of the material submitted to us may be released. Because none of the other six proposers has claimed that its proposal is confidential, those proposals must be released in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with

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[1]We note that Kimberly Quality Care asserts that all of its forms have federal copyright protection, and that the company does not consent to the reproduction, use or distribution of such material. This office has previously explained that copyright law does not affect the public's right to inspect documents under the Open Records Act. *See* Attorney General Opinion JM-672 (1987).

a published open records decision. If you have questions about this ruling, please refer to OR92-30.

Yours very truly,

Faith Steinberg
Assistant Attorney General
Opinion Committee

FS/lb

Ref.: ID# 11242
ID# 11262
ID# 11478
ID# 11513

Enclosures: Open Records Decision No. 592, 552

cc: Laurel Griffin
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